FILED
FEB 27 2003

No. 02-1140

IN THE

Supreme Court of the United States

ELAINE F. GRANT, ALFRED GRANT,
and JACQUELINE LEARY,

Petitioners,

v.

CHEVRON PHILLIPS CHEMICAL CO., L.P.
as successor in interest to Chevron Chemical Company,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

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RESPONDENT'S STATEMENT OF QUESTION PRESENTED

Do the attorney fees expressly awardable to a class representative under a specific and unique provision of Louisiana's class action law (namely, Article 595 of the Louisiana Code of Civil Procedure), if reasonably anticipated to exceed $75,000 for the claims alleged in the class action lawsuit, satisfy the amount-in-controversy requirement for federal diversity jurisdiction in the absence of any other statutory predicate under Louisiana law for an award of attorney fees?

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of the Supreme Court of the United States, respondent respectfully submits this Corporate Disclosure Statement.

The parent corporation of respondent Chevron Phillips Chemical Company LP is Chevron Phillips Chemical Company LLC. ChevronTexaco Corporation and ConocoPhillips each own 10% or more of Chevron Phillips Chemical Company LLC.

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STATEMENT OF THE CASE

As petitioners[1] observe, "[t]he facts of this case are uncomplicated and undisputed."[2] Petition for Writ of Certiorari ("Writ") at 1. However, petitioners fail to observe that the issue presented in this case is unique to Louisiana, arising as it does from the language of Article 595 of the Louisiana Code of Civil Procedure, which authorizes a court to award attorney fees directly to the class representatives in class actions brought in Louisiana.[3]

Respondent, Chevron Phillips Chemical Company LP ("CPChem"), removed the case to federal court on the basis of diversity jurisdiction, urging, *inter alia*, that: (1) in determining jurisdictional amount in class actions brought under Louisiana's class action regime, including particularly

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1. Petitioners are sometimes referred to herein as "plaintiffs."

2. Consistent with the allegations in their Class Action Petition, petitioners describe the incident of February 12, 2001 as having involved an "explosion." Writ at 1. While a fire did occur at the chemical facility, respondent maintains that no explosion preceded, accompanied, or followed the fire.

3. Article 595 authorizes the award of attorney fees that are expressly attributed solely to the plaintiffs as the named class representatives. Article 595(A) states:

> The court may allow the representative parties their reasonable expenses of litigation, including attorney's fees, when as a result of the class action a fund is made available, or a recovery or compromise is had which is beneficial, to the class.

LA. CODE CIV. P. art. 595(A).

Article 595 of the Louisiana Code of Civil Procedure, attorney fees for the entire litigation are aggregated and attributed to the class representative; and (2) any award of attorney fees on the basis of the total damages to the class alleged in the Class Action Petition would exceed the $75,000 jurisdictional amount, notwithstanding plaintiffs' failure to plead a specific amount of damages. *See* Notice of Removal, ¶¶ 6(b)(2), (5) (R. at 113, 117, 119). Plaintiffs moved to remand the case to state court, arguing that the amount in controversy was less than $75,000 and that Article 595 alone could not provide the basis for an award of attorney fees to the class representatives but must be accompanied by a substantive Louisiana fee-shifting statute. *See* Motion to Remand (R. at 64-71).

The district court denied the plaintiffs' motion to remand and certified the issue for immediate appeal to the Fifth Circuit. The Fifth Circuit affirmed the denial of the plaintiffs' motion to remand, holding:

> on the authority of art. 595(A), that when, in connection with a Louisiana class action suit that asserts a cause or causes of action for which there is no separate attorney's fees provision under Louisiana law, attorney's fees are nevertheless (1) allowable to the class representatives, and (2) attributable to the class representatives for purposes of the court's calculation of the amount in controversy. Here, art. 595(A) serves dual purposes in the context of determining jurisdictional amount in connection with removal and remand of Louisiana class actions: (1) Art. 595(A) authorizes the allowance of attorney's fees to class representatives in default of fees being

> provided by some other separate statute; and (2) as construed in [*In re*] *Abbott* [*Laboratories*], art. 595(A) requires that allowable attorney's fees be attributed to the class representative(s) (to the exclusion of non-representative members of the class) in calculating the amount in controversy under § 1332. Stated differently, when a putative Louisiana plaintiffs' class advances a cause of action, such as tort or strict liability, for which Louisiana makes no separate provision for attorney's fees, the aggregate fee allowable under art. 595(A) shall be attributed entirely to the class representatives and included in calculating the amount in controversy.

Grant v. Chevron Phillips Chemical Co., 309 F.3d 864, 876-77 (5th Cir. 2002).

As the Fifth Circuit reasoned, Article 595 of the Louisiana Code of Civil Procedure calls for an award of attorney fees to be made to the class representatives. Contrary to petitioners' position below, under *In re Abbott Laboratories*, 51 F.3d 524, 526-27 (5th Cir. 1995), Article 595 does not require a separate fee-shifting statute to support attribution of attorney fees to the named plaintiffs – the putative class representatives – in a class action. Article 595 alone requires such attribution, because it contains an "express *authorization* for the court to allow attorney's fees to the class representatives." 309 F.3d at 876 (emphasis in original). When the value of these fees are anticipated to exceed $75,000, as here, the amount-in-controversy requirement is satisfied as to the named plaintiffs (*i.e.*, the putative class representatives). Accordingly, the Fifth Circuit determined that diversity jurisdiction exists in this action.

The Fifth Circuit considered and dismissed both of the petitioners' primary contentions on appeal – namely, that the amount "in controversy" should not include an award of attorney fees (1) that is not mandatory, but merely permissive; and (2) that is awardable from a common fund (*i.e.*, funds available for the class as a whole) and does not represent a single title or right of class members. Writ at 3-4. As to the first contention, the Fifth Circuit expressly "[d]eclin[ed] to create a circuit split with the Ninth Circuit, . . . hold[ing] that when there is state statutory authority for the court to award attorney's fees to class representatives, 'either with mandatory or discretionary language, such fees may be included in the amount in controversy.'" 309 F.3d at 874 (quoting *Galt G/S v. JSS Scandinavia*, 142 F.3d 1150, 1156 (9th Cir. 1998)). As to the second issue, the Fifth Circuit expressly determined that this case was not a common fund case. 309 F.3d at 872-73.

In short, in *Grant*, the Fifth Circuit answered "an important removal and remand question," but one "unique to Louisiana's class actions because of the state's statutory scheme." 309 F.3d at 866. As such, this case does not merit this Court's review.

REASONS FOR DENYING THE WRIT

I. The Decision Below Does Not Present A Conflict With Any Decision Of The Eleventh Circuit Or This Court

Petitioners rely upon a single case, the Eleventh Circuit's decision in *Davis v. Carl Cannon Chevrolet-Olds, Inc.*, 182 F.3d 792 (11th Cir. 1999), to urge the existence of a conflict with the Fifth Circuit's decision here. In *Davis*, the court held that attorney fees to be deducted from a common fund class recovery under equitable fee-shifting provisions of Alabama law may not be aggregated for purposes of satisfying diversity's amount-in-controversy requirement, because class members do not have a single title, right or undivided interest in such fees. But *Davis* is easily distinguishable from this case, as the Eleventh Circuit itself appears to have contemplated.

At the outset, neither the issue presented in this case, nor even the issue presented in *Abbott*, was before the Eleventh Circuit in *Davis*. The *Davis* court framed the issue it faced as follows: "The narrow question we answer now is thus only whether a fee to be deducted from a common fund may, if it exceeds $75,000, satisfy the amount-in-controversy requirement." 182 F.3d at 796. This is a far different issue than the question of *attribution* addressed in *Abbott*, *see Grant*, 309 F.3d at 870 ("[T]he sole relevant issue in *Abbott* was whether art. 595(A) changes the attribution to require that the total amount of attorney's fees assessable against the defendant under [La. R.S.] § 51:137 be attributed exclusively and entirely to the class representatives."), or the question of *authorization* raised in the case *sub judice*, 309 F.3d at 871 ("[W]hether standing alone, art. 595(A) can also serve as an independent source of attorney's fees in the

absence of a separate statutory source."). The differences in these issues highlight the controlling distinctions between this case and *Davis*.

First, the issue the *Davis* court addressed arose in the context of an award of attorney fees under *equitable* principles of the so-called "common fund" doctrine, rather than pursuant to *statute*. 182 F.3d at 795-96. The Eleventh Circuit acknowledged this distinction by citing and then discounting the relevance of *Abbott*'s holding, which it described parenthetically as follows: "award of attorneys' fees against defendant *under Louisiana statute* is attributed only to the class representatives, and therefore can satisfy the jurisdictional amount in controversy." *Id.* at 796 (emphasis added). In other words, the existence of a fee-shifting statute in Louisiana meant that the answer to the amount-in-controversy question would be resolved as a matter of statutory interpretation in class action cases there, and not by an examination of equitable principles as in *Davis*, applying Alabama law. In short, Alabama statutory law does not include a provision like Louisiana's Article 595, which both *authorizes* an award of attorney fees from a class recovery and *aggregates* the award to the class representatives.[4]

A second distinction, albeit very much bound up in the first, is that *Grant*, the case before the Court, is not a "common fund" case. The Fifth Circuit expressly noted this

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4. The Eleventh Circuit is clear on this distinction. *See Cohen v. Office Depot, Inc.*, 204 F.3d 1069, 1080 n.11 (11th Cir.) (distinguishing *Abbott* as involving a state statute authorizing an award of attorney fees to the class representatives), *cert. denied*, 531 U.S. 957 (2000); *Darden v. Ford Consumer Finance Co.*, 200 F.3d 753, 758 n.4 (11th Cir. 2000) (same).

distinction in explaining the workings of Article 595 as a "fee-shifting statute":

> . . . [A]rt. 595(A) remains a fee-shifting statute, but the shifting is not between the class and the defendant. Instead, the shifting is between the class representatives and the rank and file members of the class. Furthermore, such shifting is *not* restricted to *common fund cases* (*which this case is not*): The court can allow fees to the class representatives either from "a fund made available" or from "a recovery or compromise . . . which is beneficial" to the class. Thus, in *a non-fund case like this one*, each class member's damage recovery could be reduced by the court and shifted to the class representatives, even if art. 595(A) were construed narrowly to prohibit the court from assessing attorney's fees to the losing tortfeasor.

Grant, 309 F.3d at 872-73 (emphasis added).

Finally, the *Davis* court could not find that a common-fund attorney fee represented a "single title or right" of the plaintiffs – and hence aggregable for purposes of "matter in controversy" – because "[w]hen, as here, the damages claimed are purely compensatory, the attorneys' fees are no more aggregable than the compensatory damages would be." 182 F.2d at 796. In other words, because, as in *Zahn v. International Paper Co.*, 414 U.S. 291, 294, 94 S. Ct. 505, 508 (1973), compensatory damages in a class action are not aggregable to satisfy diversity's jurisdictional amount-in-controversy, but instead are to be calculated on a pro rata basis across the entire class, attorney fees deducted from the

compensatory damage award, as part of the class recovery, are to be viewed no differently. That is to say, if the damages in a class action cannot be attributed to any single class member because class members do not share a single title, right or individual interest in such damages, then neither can an attorney fee award deducted from the class damages be aggregated as the "matter in controversy." However, these principles have no bearing in Louisiana, where a statutory provision, Article 595 of the Code of Civil Procedure, expressly provides for the aggregation and attribution to the class representatives of attorney fees awarded as part of the class action recovery.[5] *See Abbott*, 51 F.3d at 526-27

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5. Courts in states other than Louisiana, which do not have Article 595's attribution language, hold that damages awardable to a class must be assessed pro rata to each class member to ascertain whether the jurisdictional threshold is satisfied. The existence of a fee-shifting statute in these cases does not alter the analysis. The fee award to the class is to be examined pro rata, and added to the pro rata value of the claimed compensatory damages, in weighing the amount in controversy. *See, e.g., H&D Tire & Automotive-Hardware, Inc. v. Pitney Bowes Inc.*, 227 F.3d 326, 330 (5th Cir. 2000) ("The fee award could also be attributed to the plaintiff class as a whole and therefore allocated pro rata among its members for purposes of determining the amount in controversy"; construing Connecticut fee-shifting statute), *cert. denied*, 534 U.S. 894 (2001); *Goldberg v. CPC Int'l, Inc.*, 678 F.2d 1365, 1367 (9th Cir.) (claim for attorney fees under California fee-shifting statute did not satisfy amount in controversy, because aggregation of such fees to named plaintiff would conflict with the policy of *Zahn* that each class member must satisfy the amount-in-controversy requirement), *cert. denied*, 459 U.S. 945 (1982). Hence, it is plain that the existence of a state fee-shifting statute, apart from a statute like Article 595 that attributes a discrete portion of an award (here, attorney fees) to the class representatives, is not determinative of the amount-in-controversy question. Instead, as the Fifth Circuit held below in *Grant*, it is Article 595's language

(Cont'd)

("The plain text of the first sentence of 595 awards the fees to the 'representative parties.' . . . Their rights of recovery were not created by a judge's summing the discrete rights of class members. The district court applied the law of Louisiana."). Thus, in Louisiana, by operation of Article 595, class representatives do have a statutorily created "single title or right" and "undivided interest" in the class action attorney fee award.

In sum, petitioners are correct to say that an attorney fee award under Article 595 "does not represent a collective interest of the plaintiff class," Writ at 6, because an attorney fee award under Article 595 is the statutorily vested interest of the class representatives; however, petitioners are wrong to say that an attorney fee award under Article 595 "is not aggregable," Writ at 6, because under the express terms of the statute, it is. Petitioners can only establish the relevance of *Davis* by ignoring this error.

Accordingly, the Fifth Circuit's decision in *Grant* does not conflict with the Eleventh Circuit's decision in *Davis* or any decision of this Court referenced by petitioners as cited in *Davis*.

(Cont'd)

of aggregation and attribution that is determinative. *Cf. Martin v. Franklin Capital Corp.*, 251 F.3d 1284, 1293 & n.7 (10th Cir. 2001) (under New Mexico law, rejecting aggregation of attorney fees to satisfy amount in controversy, but observing with particular reference to Louisiana's Article 595: "The result might be different if the state statute under which fees are sought expressly awards those fees solely to the class representatives.").

II. The Decision Below Does Not Present A Conflict With Louisiana's Interpretation Of Article 595

Petitioners cite to a *single* decision by a *single* Louisiana appellate court, not the Louisiana Supreme Court, to urge a conflict between the Fifth Circuit's decision in *Grant* and Louisiana's interpretation of Article 595.[6] Even if such a conflict existed (and it does not), it would not constitute one of the "compelling reasons" required for review by this Court on a writ of certiorari. *See* S. Ct. R. 10. This Court's Rule 10(a) identifies as certworthy a decision by a United States court of appeals on an important federal question "that conflicts with a decision by a state court of last resort," not an intermediate state appellate court.

Moreover, no conflict can exist, as petitioners themselves recognize, because the Louisiana appellate decision cited did "not interpret [Article] 595(A) for the purposes of determining amount in controversy," Writ at 6 – which was the only "important federal question" addressed by the Fifth Circuit in the decision below.

Further, as to the supposed conflict identified by petitioners, whether the discretionary nature of an attorney fee award under Article 595 has legal importance for ascertaining the existence of the requisite amount in

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6. Notably, even the intermediate appellate court decision cited by petitioners was ultimately reversed by the Louisiana Supreme Court, albeit on an issue peculiar to Louisiana's procedural law. *See In re Gas Water Heater Products Liability Litigation*, 697 So. 2d 341 (La. App. 1997), *rev'd*, 711 So.2d 264 (La. 1998) (in determining jurisdiction of parish court under specific wording of procedural code article, amount demanded in class action is measured by total sum demanded on behalf of entire class).

controversy to support federal diversity jurisdiction is a question of federal law, not state law. And, as expressly considered in the decision below, federal courts have addressed and resolved the question in a manner the Fifth Circuit saw fit not to disturb as to create a circuit split.[7] *Grant*, 309 F.3d at 874.

In short, that Article 595 empowers a court to allocate attorney fees to the class representatives, but does not mandate that any such fees be awarded is not determinative. Article 595 makes the award of attorney fees in a Louisiana class action discretionary with the court, but there is no dispute, on the face of the allegations in the Class Action Petition in this case, that plaintiffs have requested that the discretion authorized by Article 595 should be exercised in their favor. Hence, the requested attorney fees were properly considered by the courts below to be a part of the amount in controversy.

The question whether an attorney fee award under Article 595 is a separate "element of damages" is also a red herring. As with any other amount-in-controversy case, the issue is whether the amount placed in controversy, and potentially

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7. Federal courts have resolved the issue posed by the mandatory/discretionary distinction by holding that attorney fees authorized by statute, whether with the use of mandatory or discretionary language, may be included in the amount in controversy. *See Galt G/S v. JSS Scandinavia*, 142 F.3d 1150, 1156 (9th Cir. 1998); *Surber v. Reliance National Indemnity Co.*, 110 F. Supp. 2d 1227, 1232 (N.D. Cal. 2000). *See* 14A C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3712, at 277-78 (1998) ("[W]hen the applicable substantive law makes the award of an attorney's fee discretionary, a claim that this discretion should be exercised in favor of plaintiff makes the requested fee part of the amount in controversy.").

recoverable by any plaintiff, exceeds the jurisdictional threshold. No one questions the fact that all of the damages claimed by plaintiffs to be owed by CPChem in this case are part of the amount placed in controversy. All the damages are a part of the amount in controversy – and these damages include that part of the damages demanded by the class representatives to be recoverable as attorney fees.

The only question then is whether the amount due any single member of the putative class of plaintiffs is potentially an amount in excess of the $75,000 jurisdictional threshold. Because of this Court's holding in *Zahn*, a pro rata spread of damages over the entire class often answers this question in the negative. But, because of the *unique* wording of Louisiana's class action statute, *Abbott* answered this question differently for class actions in Louisiana when it read Article 595 as attributing the class action award of attorney fees to the class representatives. The *Abbott* court found compelling "the *distinct policy choices* behind Louisiana's decision regarding rights of recovery by class members." 51 F.3d at 526 (emphasis added). Said the court: "That a state chooses a set of rules that result in an award in excess of [the jurisdictional threshold] frustrates no policy of *Zahn*. Simply put, under the law of Louisiana the class representatives were entitled to fees." *Abbott*, 51 F.3d at 526-27. Thus, without regard to whether the $75,000 threshold is exceeded by an attorney fee award from the class recovery alone or whether it is exceeded by an attorney fee award as a separate element of damages, the amount-in-controversy requirement is satisfied by the express terms of Article 595.

After all, attorney fees recoverable as an "element of damages" in class actions in states other than Louisiana, while augmenting the amount of recovery for the plaintiffs, do not

alter *Zahn* in any way and, hence, will not satisfy the amount-in-controversy requirement by the sheer force of their availability. In contrast, in Louisiana class actions, as a result of *Abbott*'s and *Grant*'s interpretation of Article 595, attorney fees recoverable under Article 595 – whether a portion of the class recovery not augmented by a statutory fee award or one augmented by such an award – are aggregated and attributed to the class representative. Hence, it is the operation of Article 595, not the character of attorney fees as a separate element of damages, that satisfies diversity's amount-in-controversy requirement.

Accordingly, the Fifth Circuit's decision in *Grant* does not conflict with "Louisiana's interpretation" of Article 595.

III. This Case Does Not Have Far-Reaching Implications, But Its Impact Is Confined To Louisiana As A Result Of A Unique Statutory Provision Of Louisiana's Class Action Law

Petitioners assert that the decision below means that "all class actions against diverse defendants will cease to exist in Louisiana state courts," because "there can be little doubt that attorney's fees in practically all class actions would be sufficient to reach the jurisprudential [a]mount of $75,000."[8] Writ at 8. Three points demonstrate that the implications of the decision below are not certworthy.

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8. Interestingly, this latter point of the petitioners was made as an "apology" by both the majority and concurring opinions in *Davis*, the principal decision upon which petitioners rely. 182 F.3d at 797-98 (majority), 798-99 (Nangle, J., concurring: noting that class action attorney fees will nearly always far exceed $75,000).

First, the impact of the decision is confined to cases in Louisiana involving complete diversity of citizenship between the parties. The *Grant* decision does nothing to undermine the complete diversity requirement of *Strawbridge v. Curtis*, 7 U.S. (3 Cranch) 267 (1806). Hence, all Louisiana class actions involving non-diverse defendants – which respondent hazards to guess are the great bulk of Louisiana class actions – will remain in state court even in the wake of the decision below.

Second, even if petitioners' contention is true, the impact of the decision is confined to Louisiana and the class actions brought in only its state courts. This hardly presents the kind of far-reaching, multi-state implications this Court usually requires for certiorari review.

Finally, even if petitioners' contention is true, it would be the result of the unique legislative and policy choices of a state legislature. *See Abbott*, 51 F.3d at 526 (alluding to "the distinct policy choices behind Louisiana's decision regarding rights of recovery by class members"). In our system of cooperative federalism, a state should have the freedom to experiment with such choices, no matter the impact on the docket of federal courts in the state.[9] In the oft-quoted words of Justice Brandeis:

> To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious

9. Respondent doubts seriously that Louisiana's "federal courts will be awash in class action litigation for . . . *de minimis* claims," as petitioners suggest. Writ at 8. The defendants' exposure to attorney fees alone in such cases eliminates the *de minimis* characterization of the amounts in controversy. Moreover, respondent apparently has more faith in (if not exp[illegible]e with) the creativity of class action plaintiffs in crafting their claims – usually by joining non-diverse defendants – to avoid federal court.

> consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.

New State Ice Co. v. Liebmann, 285 U.S. 262, 311, 52 S. Ct. 371, 386 (1932) (Brandeis, J., dissenting).

Accordingly, the Fifth Circuit's decision in *Grant* does not pose the far-reaching implications or importance as would warrant this Court's review.

CONCLUSION

For the foregoing reasons, the respondent respectfully requests that the petition for a writ of certiorari be denied.

Respectfully submitted,

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